Supreme Court, U.S.

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Case No. _____

SUPREME COURT
OF THE UNITED STATES

October 1993 Term

SHARMAN RAE McVAY,
Petitioner

v.

SAMUEL RAY PARRISH,
Respondent

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Ron Edmondson
Counsel of Record for Petitioner
DAWSON, SODD, MOE & MEANS, P.C.
P. O. Box 837 · 121 N. Main Street
Corsicana, Texas 75151
(903) 872-8181

58 pp

QUESTION PRESENTED

I. The question presented is whether the bankruptcy exemption statute, 11 U.S.C. §522(f)(1) entitles a debtor to avoid the fixing of a judicial lien on an interest of exempt property, in particular, a Texas homestead.

PARTIES TO THE PROCEEDING

All parties in the Court of Appeals for the 5th Circuit appears in the caption of this petition. 28 U.S.C. §2403(a) may be applicable.

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11 U.S.C. §522(f)(1)

28 U.S.C. 1254(1)

28 U.S.C. §2403(a)

Texas Probate Code Sec. 282

OPINIONS BELOW

The United States Court of Appeals for the 5th Circuit entered an Order and opinion in this proceeding on November 15, 1993.

The ruling of the United States Court of Appeals for the 5th Circuit is reported and a copy of that opinion is appended hereto as Appendix A.

The ruling of the United States District Court for the Western District of Texas was reported and a copy of that decision is appended hereto as Appendix B.

The ruling of the United States Bankruptcy Court for the Western District of Texas was reported and a copy of that decision is appended hereto as Appendix C.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the 5th Circuit was entered on November 15, 1993. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

At issue in this proceeding are the following provisions:

Amendment V of the Constitution of the United States of America, which states in pertinent part as follows:

* * *

No persons shall be deprived of life, liberty, or property, without due process of law;...

Amendment X of the Constitution of the Unites States of America, which states as follows:

* * *

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The following are United States Statutes and regulations at issue in this proceeding:

11 U.S.C. §522(f)(1)

The Statute is contained in Appendix D.

STATEMENT OF THE CASE

FACTS

This Petition for a Writ of Certiorari arises from the United States Court for the 5th Circuit affirming the judgment of the United States District Court for the Western District of Texas, holding that the bankruptcy exemption statute, 11 U.S.C. §522(f)(1) entitled Respondent Parrish to avoid the fixing of a judicial lien on Parrish's separate property homestead, which lien was granted to Petitioner McVay by a Texas state district court as a part of the division of the marital property estate in a divorce proceeding.

McVay and Parrish were married March 6, 1982. On March 6, 1983, Parrish inherited unimproved real property in Freestone County, Texas, at which time McVay and Parrish lived in Dallas County, Texas. Subsequently, McVay and Parrish moved to Wortham, Texas (Freestone County) where McVay and Parrish built their marital residence on Parrish's property. The funds used to improve the land and to build their home were found to be community funds by the state court and therefore McVay, under Texas law, was granted a valid equitable (judicial) lien on McVay's

and Parrish's marital homestead with Parrish being granted a new fee simple ownership to the property and improvements.

Parrish did not appeal the Divorce Decree entered March 21, 1991, by the 87th Judicial District Court of Freestone County, Texas; rather, Parrish chose to file for Chapter 7 bankruptcy, claiming that the property subject to the judicial lien was exempt from the "fixing of a lien." At the time of filing for bankruptcy, Parrish had income of $2288 per month and expenses of $1756 per month according to schedules filed by him with the bankruptcy court, as shown in Appendix E. Also Parrish's summary of Debts and Property, Appendix F, reflected debts of $104,049.00, including the $76,500 debt to McVay, and property in the amount of $231,002.00. These documents filed by Parrish with the bankruptcy court reflected Parrish's ability to satisfy the debt and equitable lien granted to McVay by the Court, McVay's only remedy for the extinguishment of her community interest in the property awarded to Parrish by the Court.

The Court of Appeals for the 5th Circuit upheld the judgment of the Western District of Texas that McVay's judicial lien was avoidable under 11 U.S.C. §522(f)(1).

ARGUMENT

I. The Court of Appeals erroneously concludes that the bankruptcy exemption statute, 11 U.S.C. 522(f)(1) entitled Parrish to avoid the fixing of McVay's prepetition judicial lien to the property awarded to Parrish in the divorce as Parrish's interest in the property did not remain unaltered after the divorce and the divorce decree did create a new property interest for Parrish.

The validity of McVay's judicial lien is not an issue. The 5th Circuit in Note 1 of its decision stated: "...We assume for the purpose of applying §522 that an enforceable lien existed,...."

McVay acknowledges that Texas law fixes character of property as community or separate as of time of inception of title. Eggemeyer v. Eggemeyer, 554 S.W.2d 137,1240 (Tex. 1977). However, important facts have been ignored by the lower courts.

First, when the property was inherited by Parrish, McVay and Parrish did not live on the property. In fact, McVay and Parrish lived some 75 miles away in Dallas County. Second, the property was totally unimproved when inherited by Parrish. Third, community property funds were used by McVay and Parrish to build their marital home and to improve the land. Fourth, McVay and Parrish moved into the home and lived there together for

several years prior to their divorce. Fifth, at the time McVay and Parrish moved onto the now improved property, it became the homestead of McVay as well as Parish. United States v. Rodgers, 46 U.S. 677, 103 S.Ct. 2132,2138 (1983). Sixth, the real property and the community improvements attached thereto remained the homestead of McVay until the divorce decree was entered by the Court. Seventh, at the point community funds were used to improve Parrish's separate property real estate, McVay was entitled to a claim for reimbursement under state law for one-half (1/2) of the funds expended for community improvements. Wierzchula v. Wierzchula, 623 S.W.2d 730,73 (Tex Civ. App. Houston {1st Dist} 1981, no writ).

Farrey v. Sanderfoot ____U.S. ___, 111 S.Ct. 1825, 114 L.Ed. 2d 337 (1991) is distinguishable from this case in one respect. Parrish did acquire the unimproved property through inheritance in 1983 as his separate property; whereas, in Farrey, the parties held title to their property as joint tenants. However, the 5th Circuit erred in its comparison of Farrey and the facts of this case from that point. The use of community funds by McVay and

Parrish to build their home on Parrish's land burdened the property with not only McVay's right to reimbursement, but also with a homestead interest. (Rodgers).

Farrey states that "§522(f)(1) does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid the "fixing" of a lien on the debtor's interest in property... The statute defines this pre-existing object as an interest of the debtor in property. Therefore, unless the debtor had the property interest to which the lien attached at some point before the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of §522(f)(1).

The judicial lien granted to McVay by the state court, like the lien in Farrey, did not attach to Parrish's pre-existing interest in the real estate, but to McVay's interest in the community improvements and her homestead interest. Since the community improvements were attached to Parrish's separate property, McVay's only remedy from the state court was the judicial lien; without the judicial lien, McVay had no way to be paid for her

interest in her marital residence. Since Parrish could not have clear fee simple title to the property without reimbursing McVay for her interest in the community improvements, the same decree that awarded Parrish his new fee simple interest in McVay's interest in the community improvements, simultaneously granted the lien to McVay. The divorce decree extinguished the homestead interest of McVay and her community one-half interest in the improvements to Parrish's separate real estate. Thus, as in Farrey, McVay's lien fixed not on Parrish's pre-existing interest, but rather on his new fee simple ownership. *In re Finch*, 130 B.R. 753 (S.D.Tex. 1991).

"The Texas Constitution gives each spouse in a marriage a separate and undivided possessory interest in the homestead, which is lost only by death or abandonment and which may not be comprised by the other spouse or by his or her heirs." Pemelton v. Pemelton 809 S.W.2d 642 (Tex. App.-Corpus Christi 1991). Until the divorce decree was entered, Parrish, under Texas law, could not make a loan on the property or sell the property without the joinder of McVay. Furthermore, if Parrish had died while still married to McVay, McVay could have lived in the house on the

property until she died or abandoned the property. Texas Probate Code §282 states as follows:

> The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be the separate property of the deceased or community property between the surviving spouse and the deceased, and the respective interests of such surviving spouse and children shall be the same in one case as in the other.

The Divorce Decree stated: "Respondent (Parrish) is awarded the following as Respondent's sole and separate property, and Petitioner (McVay) is hereby divested of all right, title, interest, and claim in and to such property: (emphasis added).

> 1. The following real property is confirmed as the separate property of Respondent, SAMUEL R. PARRISH, subject to the equitable lien of Petitioner, SHARMAN RAE PARRISH:... (emphasis added).

a. Located in Freestone County, Texas, to-wit: BEING 13.15 acres out of the R. B. Longbotham League Survey in Freestone County, Texas, Abstract No. 16, and being Tract No. 2, according to survey made of said J.J. Ferguson Estate of R. B. Longbotham League, on March 8th, A.D. 1937, by L. B. Gamewell, State Licensed Surveyor for Texas, and said Tract No. 2 being out of the 101 acre tract of said estate and described by metes and bounds, as follows:

BEGINNING in the N. line of said tract 298 vrs. E. of the N.W. corner of said tract; THENCE S. 454.2 vrs to the S.E. corner of Tract 1; THENCE E. 156.2 vrs. a stake for interior corner of Tract 3; THENCE N. 105 vrs. a stake in the E. line of said 101 acres 9.5 vrs. N. of the N. W. corner of Tract of 63.5 acres; THENCE N. 339.5 vrs. a stake for N.E. corner of said 101 acres; THENCE W. 325.5 vrs. to the place of beginning; and

BEING the land conveyed to Franke L. Parrish as a partition and division of land and premises between J. G. Longbotham, Eunice Thomson, Franke Parrish, A.L. Moody, and Margaret Hayter, as heirs at law of M. J. Ferguson, Deceased, dated March 15, 1937, and being recorded in Volume 149, Page 30, Deed Records of Freestone County, Texas;

SAVE AND EXCEPT: 4 acres off of the South of the said tract which was sold to Floyd C. Calame, by deed dated October 7, 1950, which deed appears of record in Book 213, Page 457, Deed Records of Freestone County, Texas.

There is no question that the Decree of Divorce dissolved McVay's pre-existing interest in the homestead and that her new interest, as in Farrey, was created in the divorce decree and evidenced by her judicial lien on Parrish's new interest in the property. This Court in Farrey went on to say that there would be the same result "even if the divorce decree did not extinguish the

couple's pre-existing interests, but instead merely reordered them." As in Farrey, the divorce decree in this case transferred McVay's previous interest in the property to Parrish and "again simultaneously granted a lien equal to that interest...." Also as in Farrey, Parrish would still be unable to avoid the lien since it fastened only to what had been McVay's pre-existing interest, and this interest Parrish would never have possessed without the lien being fixed.

Farrey states further: "We hold that §522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." Farrey at 1831.

As shown in Appendix E and F, Parrish had sufficient assets with which to satisfy McVay's lien. As stated In re Miller, 58 BR 192 (S.D.Tx. 1985): "Bankruptcy court had no authority to review State court divorce decree. This Court's jurisdiction is limited by Congress and it does not have any authority to sit as an appellate court reviewing the decisions of a State Court." The bankruptcy was filed with one purpose in mind: to take from McVay the only

significant property interest awarded to her in the Decree, the judicial lien. To permit Parrish to use 11 U.S.C. 522(f)(1) to deprive McVay of her property rights under state law violates not only good common sense, but more importantly violates McVay's constitutional rights pursuant to Amendment V and Amendment X. State law provided McVay with one remedy, and the Court awarded her that sole remedy. Yet, McVay has been unconscionably deprived of that property by the lower courts which failed to recognize that Congress primarily intended §522(f)(1) as a device to "thwart creditors, who sensing an impending bankruptcy, rush to Court to obtain a judgment to defeat the debtor's exemptions." Farrey at 1831.

McVay did not obtain her lien to defeat Parrish's pre-existing interest, but to protect her own pre-existing interest in the marital homestead.

CONCLUSION

As stated above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the 5th Circuit.

RESPECTFULLY SUBMITTED, February 7, 1994.

Respectfully submitted,

DAWSON, SODD, MOE & MEANS, P.C.

By: Ron Edmondson

Ron Edmondson
State Bar No. 06430000
Attorney for Petitioner
P. O. Box 837
Corsicana, TX 75151
Telephone No.: (903) 872-8181
Fax No: (903) 872-3654

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In the Matter of Samuel Ray PARRISH, Debtor.

Sharman Rae McVAY, Appellant,

v.

Samuel Ray PARRISH, Appellee.

No. 93-8063

Summary Calendar.

United States Court of Appeals,

Fifth Circuit.

Nov. 15, 1993.

Former wife of Chapter 7 debtor filed complaint contesting avoidance in Chapter 7 case of prepetition equitable lien imposed by Texas divorce decree to secure judgment in wife's favor against husband representing half of reimbursement to community estate for improvements husband made to land he inherited during marriage. The Bankruptcy Court, Larry E. Kelly, Chief Judge, 144 B.R. 349, allowed husband to avoid lien. Wife appealed. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., affirmed. Wife appealed. The Court of

Appeals held that under Texas law, property inherited by husband during marriage and prior to divorce was his separate property, and thus, lien attaching to that property pursuant to state court divorce decree was avoidable under Bankruptcy Code provision allowed debtor to avoid fixing of judicial lien on property made exempt as homestead.

Affirmed.

1. **Bankruptcy 2792**

Bankruptcy Code allows debtor to avoid fixing of judicial lien on property made exempt as homestead; protection is limited in that debtor cannot void lien on interest acquired after lien attached. Bankr.Code, 11 U.S.C.A. §§522, 522(f)(1).

2. **Bankruptcy 2792**

Prepetition equitable lien attaching to Chapter 7 debtor's interest in separate property acquired through inheritance following his marriage and securing divorce judgment in favor of former wife was avoidable in Chapter 7 proceeding pursuant to provision of Bankruptcy Code allowing debtor to avoid fixing of judicial lien on property made exempt as homestead, where debtor's separate

interest existed before divorce and continued unaltered afterwards and divorce decree did not create new property interest for debtor. Bankr.Code, 11 U.S.C.A. §§ 522, 522(f)(1), 701 et seq.

3. Husband and Wife 249(5)

Texas law fixes character of property as community or separate property as of time of inception of title.

Appeal from the United States District Court for the Western District of Texas.

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

The parties contest the avoidance in bankruptcy of an equitable lien imposed by a Texas divorce decree. We agree with the courts below that the lien is avoidable as a judgment lien under 11 U.S.C. §522(f).

Samuel Parrish and Sharman McVay married March 6, 1982. A year later Parrish inherited a 23.15 acre tract from his mother. The parties divorced on March 21, 1991. The divorce

decree included a judgment in McVay's favor against Parrish for $76,500, representing half of the reimbursement to the community estate for improvements Parrish made to the land he inherited. This judgment was secured by an equitable lien against that land. Parrish filed for Chapter 7 bankruptcy relief on May 29, 1991. The bankruptcy court allowed Parrish to avoid the lien under 11 U.S.C. §522(f)(1), 144 B.R. 349 and the district court affirmed.

[1] Section 522(f)(1) allows a debtor to avoid the fixing of a judicial lien on property made exempt as a Texas homestead.[1] Its protection is limited in that a debtor cannot avoid a lien on an interest acquired after a lien attached. *Farrey v. Sanderfoot*, -- U.S. --, 111 S. Ct. 1825, 114 L.Ed.2d 337 (1991). *Farrey* involved a divorce decree that simultaneously ended a marital community and created a lien against one of the new separate property interests. The court reasoned that when a debtor simultaneously acquired a fee simple interest and a lien on that interest, there was no risk that

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[1]Parrish also contests the validity of the lien under Texas law. We assume for the purpose of applying §522 that an enforceable lien existed, but we express no opinion as to the merits of Parrish's contention.

the lien had been created by a creditor rushing to court in anticipation of bankruptcy. The policy behind section 522(f)(1) was not advanced by applying it under those circumstances. *Id.*, ___ U.S. at ___ _ ___, 111 S.Ct. at 1830-31. *See also In re Finch* 130 B.R. 753, 757 (S.D.Tex.1991) (reaching the same result under Texas Community property law.)

[2,3] This case is distinguishable from *Farrey* and *Finch*. Parrish acquired the property through inheritance in 1983 as his separate property. From that point on it was his separate property, as Texas law fixes the character of property as of the time of inception of title. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex.1977). Thus the decree did not create a new property interest for Parrish as did the decrees in *Farrey* and *Finch*. Since Parrish's interest existed before the divorce and continued unaltered afterwards, we find that the lien attaching to that property was avoidable under section 522.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

IN RE:	§	
	§	
SAMUEL RAY PARRISH,	§	
Bankrupt.	§	
----------	§	
	§	
SHARMAN RAE McVAY,	§	
Appellant,	§	Civil No. W-92-CA-270
v.	§	
	§	
SAMUEL RAY PARRISH,	§	
Appellee.	§	

MEMORANDUM OPINION

Came on this day to be considered the appeal of a bankruptcy Order entered by Judge Larry E. Kelly on August 24, 1992, vacating the Appellant's judicial lien as an impairment of Appellee's Texas homestead exemption.

I. Background

The Appellant, Sharman Rae McVay ("McVay"), and the Appellee, Samuel Ray Parrish ("Parrish"), were married on March 6, 1982. On March 6, 1983, Parrish inherited the real property that is the subject of this litigation. A home was subsequently constructed on this inherited land, using money from

an early termination benefit received by Parrish. On March 21, 1991, the parties were granted a Decree of Divorce by the 87th Judicial District Court of Freestone County. Pursuant to a jury verdict, the Decree of Divorce granted McVay a judgment against Parrish for $76,500.00, representing half of the reimbursement to the community estate, ordered by the trial court, for improvements made to Parrish's inherited separate property, secured by an "equitable lien" in McVay's favor against the subject real property. The jury found that the "early termination benefit" was not a previously acquired retirement account earned by Parrish, but rather community income. Parrish filed for Chapter 7 bankruptcy relief on May 29, 1991, and thereafter filed the underlying complaint against McVay to determine the dischargability of her judgment lien against him.

This Court must determine whether the bankruptcy court's "Order Avoiding Judgment Lien" should be reversed, thereby validating the equitable lien awarded to McVay in the division of community property upon the divorce of McVay and Parrish. The Order of the bankruptcy court totally nullified the effect of the

order of the state trial court; stripped McVay of court-awarded compensation for community improvements erected during the marriage upon Parrish's separate unimproved real estate; and cut off McVay's homestead interest in those improvements.

II. Standard of Review

The bankruptcy court's conclusions of law are subject to plenary review. Matter of Nobleman, 968 F.2d 483, 485, n. 5 (5th Cir. 1992); In re Delta Towers, Ltd., 924 F.2d-74, 76 (5th Cir. 1991). Its findings of fact will be upheld unless fund to be clearly erroneous. Matter of Bennett, 970 F.2d 138, 139 (5th Cir. 1992); In re Missionary Baptist Foundation, Inc., 712 F.2d 206, 209 (5th Cir. 1983).

III. Discussion

A. Bankruptcy Exemption Statute:

McVay is a judgment creditor seeking to enforce a judgment lien. The bankruptcy exemption statute, 11 U.S.C. §522(f)(1), entitles the debtor to avoid the fixing of a judicial lien on an interest of his exempt property (Texas homestead). In Farrey v. Sanderfoot, 111 S.Ct. 1825 (1991), the Supreme Court held that

a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached. Therefore, the critical inquiry is whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he did, §522(f)(1) permits the debtor to avoid the fixing of the lien on that interest.

Parrish acquired his property through inheritance in 1983. From that point forward, it was his separate property. The fact that it was later improved using community funds does not change the character of the property. Under the inception of title rule, the character of property is fixed upon the inception of title. Parrish clearly had an interest in the property prior to the fixing of the lien; therefore, he can avoid the fixing of the lien on that interest.

B. Texas Law:

The Texas Supreme Court decision in Heggen v. Pemelton, 836 S.W.2d 145 (Tex. 1992), also controls the disposition of this case. Although this decision was not yet final at the time of Judge Kelly's Order, it has now become final. In Pemelton, Charlotte Heggen and Billy Gene Pemelton were married in 1960. In 1965, they settled on a 32-acre ranch owned by Ms. Heggen's parents,

who later deeded the tract to Ms. Heggen in 1969. In 1988, Ms. Heggen filed for divorce. As part of the division of property, the court awarded Ms. Heggen the 32-acre separate property homestead, and recognized Mr. Pemelton's right of reimbursement for any homestead improvements made with community funds. The court also ordered Ms. Heggen to pay $150,000 to Mr. Pemelton for his community interest in the homestead and imposed an equitable lien on the homestead in order to enforce the court's judgment.

The Supreme Court recognized that "trial courts may impose equitable liens on one spouse's separate real property to secure the other spouse's right of reimbursement for community improvements to that property." Pemelton at 146. The Court noted, however, the trial courts "may not impress such liens, absent any compensable reimbursement interest, simply to ensure a just and right equitable division." Id.

The Court's holding, however, is much more narrow than the above statements might imply. The Court held that under the Texas Constitution, there are two requirements to properly impress

an equitable lien on a spouse's separate property homestead to secure a non-owner spouse's right of reimbursement. First, the lien must burden the separate real property for reasons relating to securing the non-owner spouse's reimbursement interest, not just to secure a just and right equitable division. Second, the lien must fit into one of the categories allowed by the Texas Constitution; that is, a purchase money lien, a tax lien, or a home improvement lien for which the work and material had been contracted for in writing with the consent of both spouses. Id. at 147-48. Failure to meet these requirements would impermissibly allow the non-owner spouse to foreclose upon the owner spouse's homestead, "a result contrary to the protections plainly afforded homesteads by [the Texas] Constitution." Id. at 148. This result would impermissibly divest the owner spouse of separate real property without sufficient legal basis. Id. The lien in Pemelton failed to meet both parts of this two-part test.

The disputed issue in this case, therefore, is whether the equitable lien imposed by the divorce court against Mr. Parrish's separate real property conformed with the above test. With regard

to the first part of the test, the Court in Pemelton found that the trial court's imposition of an equitable lien on Ms. Heggen's separate real property was simply an attempt to impose a just and right equitable division; no serious reimbursement claim was asserted. Id. at 146. This is not true in this case, where a jury found that community funds were used to enhance the value of Mr. Parrish's separate real property. Therefore, this Court is of the opinion that the first part of the test has been satisfied; the lien burdened the separate real property for reasons relating to securing Ms. McVay's reimbursement interest, not just to secure her a just and right equitable division.

With regard to the second part of the test, the Pemelton court determined that the lien in question did not fit into any of the three enunciated categories. Id. at 148. Judge Kelly came to the same conclusion in this case. The Appellee argues in his Brief to this Court that the lien against his homestead is invalid because there is no evidence that Parrish pledged the property to McVay as security for purchase money, or that he executed a lien to her for

work and materials used in constructing improvements, contracted in writing, with the consent of both spouses.

The Appellant argues that the lien meets both the purchase money and improvement lien categories of the Constitutional test. Moreover, she asserts that "because the parties chose to use community 'cash' to pay for the construction of their home, there was no legal requirement to 'contract in writing' for the work and material." Appellant's Brief at 6. She further argues that Judge Kelly's construction of Pemelton is totally misplaced, and "would require the Parrishes to enter into a fraudulent mechanic's and materialmen's lien contract with a 'straw man' contractor in order to create a fictitious contractual lien to protect McVay's rights of reimbursement, even though they borrowed no money to purchase materials or to construct improvements on the unimproved real estate." Appellant's Brief at 7. Appellant's argument is totally misplaced. As pointed out in her own Brief, the mechanic's and materialmen's lien is intended to protect the priority and validity of a contractor's lien on an owner's homestead, not the potential lien of a divorcing spouse. Therefore, the strictures enunciated in

Pemelton were not intended to include this type of lien. The sole fact that the community funds were used to build a house on the separate real property does not equate in any way to a home improvement lien. Accordingly, this Court is of the opinion that Judge Kelly's construction of the Pemelton case was correct.

IV. Conclusion

Upon careful consideration, the Court is of the opinion that Judge Kelly's decision in the bankruptcy proceeding below was correct and should be affirmed. Accordingly, it is

ORDERED that Judge Kelly's Memorandum Opinion in Bankruptcy Case No. 91-60631-LK is **AFFIRMED** in all respects consistent with this opinion. It is further

ORDERED that this case be **REMANDED** to the bankruptcy court for further proceedings not inconsistent with this opinion.

SIGNED this 28th day of December, 1992.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

In re:

SAMUEL RAY PARRISH,

Debtor

CASE NO. 91-60631-LK

SAMUEL RAY PARRISH,

Plaintiff

v.

SHARMAN RAE McVAY,

Defendant

ADVERSARY NO. 91-6061

In the United States Bankruptcy Court

for the Western District of Texas,

Waco Division

Decided August 24, 1992

MEMORANDUM OPINION

Came on to be tried the above-styled Adversary Proceeding. The parties appeared in person and were represented by counsel. After considering the argument of the parties, the court took the

matter under advisement in order to review the materials which were submitted to it. This is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(K) and 11 U.S.C. §522(f)(1). The following constitute the court's Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052.

Background Facts

Samuel Ray Parrish ("Debtor") filed this Adversary Proceeding originally seeking to avoid a lien on his homestead held by Sharman Rae McVay ("McVay"), his former wife. His original complaint also requested that the court determine whether or not the debt secured by the lien owed was dischargeable and further requested that the court determine whether or not a transfer of a 2.93% interest in his "retirement benefits" could be avoided. At trial, the Debtor withdrew any request that the transfer of the 2.93% of his "retirement benefits" be avoided and no party raised the issue of the dischargeability of the underlying claim of Ms. McVay against the Debtor. Apparently the parties have concluded that it is, in fact, dischargeable. During the marriage of these parties, Mr. Parrish received approximately $247,000.00 in a lump

sum from his employer upon early termination of employment and a substantial portion of those funds were used to construct a house on separate real property of the Debtor in which the parties dwelled. In the divorce proceeding, the trial court granted the divorce, determined that the $247,000.00 was community property, determined that a substantial amount of it had been used to improve "separate property" of the Debtor and imposed an equitable lien on the separate property in favor of Ms. McVay for the principal sum of $76,500.00 plus her reasonable attorney's fees which the court found to be $10,000.00. The primary issue before this court is to determine whether or not the equitable lien imposed on the separate property of the Debtor can be avoided as a judgment lien under 11 U.S.C. §522(f).

Findings of Fact

There are no material facts which are in dispute in this case. The parties presented the court with an Amended Agreed Pretrial Order which presented the following "agreed facts":

1. Plaintiff ("Debtor") and Defendant ("McVay") were divorced by final decree of divorce signed on March 21, 1991, by the 87th

District Court of Freestone County, Texas, following a jury trial ("divorce decree").

2. The parties had been married 9 years.

3. During the marriage the Debtor received $247,878.00 in a lump sum early termination benefit from the Sun Company.

4. At the divorce trial, the jury found that the early termination benefit was not a part of the Debtor's retirement benefits, but rather community property.

5. The early termination benefit community property was used by the parties to build a home on raw land which Debtor had inherited during the marriage ("the property").

6. The parties lived on the property as their homestead prior to their divorce.

7. The divorce decree divided the community estate by awarding the property to the Debtor and granting the Defendant a lien on the property to secure a $76,500.00 community reimbursement by the Debtor to the Defendant for improvements made to the property.

8. The Debtor claimed the property as exempt in his Chapter 7 bankruptcy case.

Additional facts which were really not disputed but formed no part of the "agreed facts" are found by this court as follows:

9. The property at issue represented separate property of the Debtor at all times relevant to this proceeding.

10. The property awarded to the Debtor represented the Debtor's homestead at all times relevant to the proceedings before the court.

11. The divorce decree specifically decreed that "Sharman Rae Parrish, Petitioner, recover of and from Samuel R. Parrish, Respondent, judgment for $76,500.00, representing Petitioners one-half (1/2) interest in *community reimbursement for improvements* made to Respondent's separate property and a judgment for $10,000.00 for attorney's fees herein awarded to Petitioner against Respondent; said total judgment of $86,500.00 to be paid together with judgment interest thereon at the rate of 8% per annum and payable in 144 monthly installments of $936.32 per month beginning on April 1, 1991, and a like payment due and

payable on the 1st day of each month thereafter until the sum of $86,500.00 is paid in full, for which let execution issue. *This judgment is part of the division of the community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony or child support.*" (emphasis added)

This court finds that no part of the $76,500.00 or $10,000.00 in attorney fees represents any form of spousal support, alimony or child support.

12. The divorce decree went on to grant an "equitable lien" against the real property owned by the Debtor and then "confirmed" that such real property was the separate property of Samuel R. Parrish, although it was stated to be "subject to the equitable lien of the petitioner, Sharman Rae Parrish."

Statement of the Legal issue Presented

The parties advised the court that the only issue being litigated was whether or not 11 U.S.C. §522(f)(1) allows the Debtor to avoid his exspouse's judgment lien. Each referred this court to the U. S. Supreme Court's recent decision in *Farrey v. Sanderfoot*,

111 S.Ct. 1825, __ U.S. ___, 114 L.Ed.2d 337, (1991), and to *In re Finch*, 130 B.R. 753 (S.D.Tex.1991).

DISCUSSION

A. General Principles

The general rules are not in dispute. When Debtors use state law to claim exemptions, the bankruptcy court must turn to state law to interpret their exemption rights in homesteads. *Butner v. United States*, 440 U.S. 48, 50; 90 S.Ct. 914, 915, 59 L.Ed.2d 136 (1979).

In order to understand the effect of the "equitable lien" imposed by the state court in the divorce decree, one must first understand the concept which authorized the imposition of same. There are a number of factual contexts under which reimbursement between a separate property estate and a marital community property estate may arise. See generally, Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L. Rev. 945 (1987). Our discussion is limited to situations where the community estate funds are used to improve separate property of one of the spouses and a claim for

reimbursement is made. When reimbursement is allowed the measure of reimbursement is the "enhanced value" to the property improved. *Anderson v. Gilliland*, 684 S.W. 2d 673 (Tex. 1985).

The nature of this right is also clearly equitable as opposed to legal. See, *e.g.*, *Burgon v. Bell*, 380 S.W.2d 561(Tex. 1964) ("The charge or equity which one estate has against the opposite estate for reimbursement of all funds spent in enhancing the value of such opposite estate is *only a claim for money in return of funds and not a right, title, or interest in the land.*" (Citations omitted) (emphasis added); *Vallone v. Vallone*, 644 S.W.2d 455 (Tex. 1982) ("rule of reimbursement is purely equitable and obtains when community estate in some way improves separate estate of one of spouses, or vice versa; right of reimbursement of separate or community estate is not interest in property or enforceable debt, *per se*, but equitable right which arises upon dissolution of marriage through death, divorce or annulment; reimbursement of community or separate estate is not available as a matter of law, but lies within discretion of court."); *Cook v. Cook*, 665 S.W.2d 161 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.) ("reimbursement to marital estate for funds

advanced to improve another marital estate is not based upon acquisition of title interest in either underlying realty or improvements, but rather is based upon equitable principles and award of reimbursement simply creates obligation to pay for enhancement in value attributable to improvements, which obligation in no way deprives the estate of its title interest in either underlying realty or improvements thereon and does not constitute impermissible divestiture of separate property"); *Smith v. Smith*, 715 S.W.2d 154 (Tex.App.--Texarkana 1986) no writ ("the right to reimbursement is in equity; a mathematical certainty in its determination is not required."); *Kamel v. Kamel*, 760 S.W.2d 677, (Tex.App.--Tyler 1988), writ den. ("community is entitled, upon dissolution of marriage, to reimbursement in amount of resulting enhanced value of separate property, where community funds are used to make improvements to separate property of one spouse); *Magill v. Magill*, 816 S.W.2d 530, (Tex.App.--Hous [1st Dist] 1991) no writ ("reimbursement is equitable claim in dissolution proceeding").

One other important principle in Texas is the rule that a spouse must not be divested of his or her separate real property upon divorce. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977).

In some cases, however, it has been argued that an equitable lien can be imposed on separate real property to reimburse the community for funds of the community that were used to enhance that separate property. See, *e.g., Smith v. Smith*, supra (although no lien was allowed on separate property homestead) and *Kamel v. Kamel*, supra (okay to give lien on separate property homestead where community funds used to make improvement thereon).

B. Current Case Law

Whether or not an equitable lien can be an enforceable lien on a spouse's separate property homestead is still not settled however. See Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945(1987).

In a recent opinion, *Pemelton v. Pemelton*, 809 S.W.2d 642 (Tex.App.--Corpus Christi, 1991) writ granted, the Court of Civil

Appeals had a suit for characterization of property and division of the community assets pursuant to divorce. In relevant part, a lien was granted to Mr. Pemelton to "equalize division of the community estate." The equitable lien was granted against Ms. Pemelton's separate property for "his interest in the homestead." The evidence indicated that the community was due reimbursement from improvements made to her separate property. The Court of Appeals found that each party had a homestead interest which vested independent of fee interest in the realty. Because Mr. Pemelton was divested of his "independent" homestead interest the Appellate Court found that the trial court was authorized to grant him an equitable lien to secure payment of the amount awarded to him for his interest.

The Texas Supreme Court granted writ of error and has recently rendered an opinion which may be found at 1992 WL 140838. The opinion itself, however, has not been released for publication and therefore is not at this point authority for any of the legal principles presented therein. However, it does propose to reverse the Court of Appeals, and to hold that "a judgment

awarded to one spouse cannot be secured by a lien on the other spouse's separate property homestead unless the amount covers reimbursement for improvements made by the community to the separate property." It then indicates that the equitable lien for improvements might be imposed if all the requirements of the Texas Constitution were met, *i.e.*, indicating that if the work and material used in constructing improvements was contracted for in writing, with consent and signature of both spouses. This pending opinion of the Texas Supreme Court, not having been released for publication, does not yet resolve the issue. However, it does indicate that the lien in this case is not necessarily enforceable, whether or not it is avoided by Code §522(f)(1).

See also, *Jensen v. Jensen*, 665 S.W.2d 107(Tex. 1984). In *Jensen* the Supreme Court was faced with a divorce proceeding and division of property, primarily consisting of stock, which was owned by one spouse before marriage but which had increased in value substantially during the marriage. Ultimately, the court determined that reimbursement might be owed to the community and remanded the case for a determination of the amount, if any. It

did, however, specifically rule that "if the right to reimbursement is proved, a lien shall not attach to Mr. Jensen's separate property shares. Rather, a money judgment may be awarded." *Jensen*, supra at 110. Commentators have speculated that decision may indicate that equitable liens cannot be imposed on separate property of one spouse to reimburse the community for community funds advanced to improve it. Fred C. Weekley, Reimbursement Between Separate and Community Estates--The Current Texas View, 39 Baylor L.Rev. 945, (1987). The pending Pemelton decision would seem to follow that thought, unless the lien meets the requirements for other enforceable liens which are set out in the Texas Constitution.

It is undisputed that at all times relevant to this proceeding, Mr. Parrish owned 100% of the title to the real property at issue and that at all times it was his separate property. The law shows that Ms. McVay's "claim" is an equitable claim and not any form of an interest in the separate real property of Mr. Parish. The facts demonstrate that this "equitable claim" was reduced to a judgment in the divorce decree and granted to Ms. McVay as a part of the equitable determination that reimbursement in some amount should

be awarded to the community estate. As an award to the community estate it then was divided in the divorce decree with one half of the reimbursement being reduced to judgment in favor of Ms. McVay and an "equitable lien" then being imposed by judgment upon the Debtor's separate property homestead.

Ms. McVay's reliance on *Farrey v. Sanderfoot*, as requiring this court to rule in her favor, appears to be misplaced. The Supreme Court therein specifically found that under Wisconsin law both spouses had an undivided joint tenancy in the land during the marriage, that this joint tenancy terminated on divorce and that new separate property interests were then created for both parties. As such, the lien awarded to the spouse not acquiring the new property interests did not attach to the acquiring spouse's previous one-half joint tenancy interest, but to the acquiring spouse's "new" fee simple interest. Id., 111 S.Ct. at 1831.

A similar determination was made by the U. S. District Court in the recent case of *In re Finch*, 130 B.R. 753, (S.D. Tex. 1991). In *Finch*, the court compared the Wisconsin law, as reported in *Farrey v. Sanderfoot*, with Texas community property

law. The property being divided in Finch was all community property. The court found that community interests also do not survive divorce. If the property is not divided, then the ex-spouses become tenants in common. If it is divided, then the acquiring spouse's one-half community interest is divested and is revested with a fee simple ownership. Thus, the court imposed equitable lien, like in *Farrey v. Sanderfoot*, was not imposed on the acquiring spouse's pre-existing interest, but on his contemporaneously acquired fee simple interest. As such, the lien was held to be enforceable and immune from avoidance under 11 U.S.C. §522(f)(1). Finch, at 757.

CONCLUSION

In stark contrast to *Farrey v. Sanderfoot*, supra and *In re Finch*, are the facts in the current case. 11 U.S.C. §101(36) defines "judicial lien" to mean a "lien obtained by judgment, levy, sequestration, or other legal or other equitable process or proceeding." The lien granted to Ms. McVay in the divorce decree is such a judicial lien granted to secure her equitable claim. The Debtor's interest in the separate property made the subject of this

proceeding, however, was owned by him at all times prior to the institution of the divorce as his separate property and subsequent to the divorce as his separate property. As such, the judgment lien granted to Ms. McVay in the divorce decree represents the fixing of a lien on a pre-existing interest of the Debtor in property and impairs an exemption to which he would have been entitled under 11 U.S.C. §522(b). As such it is not immune to avoidance.

This court is not certain from state law whether the judgment lien is enforceable against the separate real property homestead of the Debtor. However, under the current state of Texas law, if it did attach, it is clear to the court that it is avoidable under 11 U.S.C. §522(f)(1).

A separate order of even date herewith will be executed by the court to effectuate its Finding of Facts and Conclusions of Law.

SIGNED this 24th day of August, 1992.

Larry E. Kelly

Chief United States Bankruptcy Judge

11 U.S.C. §522(f)(1)

"(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(1) a judicial lien; or....."

STATEMENT OF CURRENT INCOME AND EXPENSES

1. CURRENT INCOME ANALYSIS.		Debtor
a.	Current pay periods are:	None
b.	Gross wages per pay period are:	0.00
c.	Payroll deductions per pay period are:	
	Payroll taxes	0.00
	Medical insurance	0.00
	Credit Union	0.00
	Retirement	0.00
	Life insurance	0.00
d.	Take-home pay per period:	0.00
e.	Is your employment subject to seasonal change?	No
f.	Gross income for last calendar year:	0.00

2. CURRENTLY MONTHLY INCOME:

From debtor's principal employment	0.00
Retirement Benefits	1,876.00
City of Wortham	250.00
Son, Timothy J. Parrish	162.00
Total	$ 2,288.00

3. CURRENTLY MONTHLY EXPENSES:

(1)	Rent or Mortgage payment(s)	0.00

(2)	Utilities:		
	Electric	200.00	
	Phone	100.00	
	Heat	0.00	
	Water	50.00	
	Other	50.00	
		Total Utilities	400.00
(3)	Food		325.00
(4)	Clothing		75.00
(5)	Laundry & drycleaning		50.00
(6)	Newspapers, periodicals & books		25.00
(7)	Medical & drug expenses		75.00
(8)	Insurance: Auto		123.00
	Other		239.00
(9)	Transportation		175.00
(10)	Recreation		50.00
(11)	Dues, union, professional, social or otherwise		0.00
(12)	Taxes: Personal property		413.00
	Other		0.00
(13)	Alimony, maintenance or support		0.00
(14)	Other payments for support of dependents not living at home		0.00
(15)	Religious & charitable contributions		0.00
(16)	Auto payments		219.00
	Total Estimated Future Monthly Expenses:		$ 2,169.00
c.	Excess of income over expenses		$ 119.00

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I, Samuel Ray Parrish, declare under penalty of perjury that I have read the answers contained in the foregoing statement, and that they are true and correct to the best of my knowledge, information, and belief.

Executed on 6/13/91.

(Original signed by Samuel R. Parrish
Signature of Debtor

SUMMARY OF DEBTS AND PROPERTY

(From the statements of the debtor in Schedules A and B)

Schedule		Total
DEBTS:		
A-1/a,b	Wages, etc. having priority	None
A-1/c	Deposits of money	None
A-1/d(1)	Taxes owing United States	None
A-1/d(2)	Taxes owing states	None
A-1/d(3)	Taxes owing other taxing authorities	None
A-2	Secured claims	12,635.00
A-3	Unsecured claims without priority	91,414.00
	Schedule A Total:	$ 104,049.00
PROPERTY:		
B-1	Real Property (total value)	211,000.00
B-2/a	Cash on hand	None
B-2/b	Deposits	None
B-2/c	Household goods	5,195.00
B-2/d	Books, pictures, and collections .	None
B-2/e	Wearing apparel and personal possessions	785.00
B-2/f	Automobiles and other vehicles .	7,081.00
B-2/g	Boats, motors, an accessories . . .	None
B-2/h	Livestock and other animals	4,500.00
B-2/i	Farming supplies and implements	None
B-2/j	Office equipment and supplies . .	None
B-2/k	Machinery, equipment & supplies used in business	None
B-2/l	Inventory	None
B-2/m	Other tangible personal property	None
B-2/n	Patents and other general intangibles	None

B-2/o	Bonds and other instruments	None
B-2/p	Other liquidated debts	None
B-2/q	Contingent and unliquidated claims	None
B-2/r	Interests in insurance policies	None
B-2/s	Annuities	None
B-2/t	Interests in corporations and unincorporated companies	570.00
B-2/u	Interests in partnerships	None
B-2/v	Equitable & future interests, rights & Powers in personalty	None
B-3/a	Property assigned for benefit of creditors	None
B-3/b	Property not otherwise scheduled .	1,876.00
	Schedule B Total	$231,007.00

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I, Samuel Ray Parrish, declare under penalty of perjury that I have read the foregoing schedules, consisting of _____ sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on 6/12/91.

(Original signed by Samuel Ray Parrish)
Signature